No. 82-1050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,

v.

ROBERT H. MATHEWS, *Et Al,*
Appellees.

On Appeal from the United States District Court
For the Northern District of Alabama

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the exception clause of the government pension offset provision which incorporates by reference the gender-based dependency requirement previously held unconstitutional by this Court's decision in *Califano* v. *Goldfarb:* A) should be interpreted without reference to that requirement, or, if not, B) violates the equal protection component of the Due Process Clause of the Fifth Amendment.

2. Whether a severability clause which precludes all persons harmed by an unconstitutional statutory classification from securing judicial relief is an unconstitutional obstruction of the exercise of judicial review.

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Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the district court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall...be deprived of life, liberty, or property, without due process of law; now shall private property be taken for public use, without just compensation.

LEGISLATIVE PROVISIONS INVOLVED

Section 334 of Public Law 95-216 provides for the non-applicability of the 1977 Amendments as follows:

> The amendments...shall not apply to an individual...who at the time of application for initial entitlement to such monthly (b), (c), (e), (f), or (g) meets the requirements of that subsection as it was in effect and being administered in January, 1977.

The severability clause of Section 334 of Public Law 95-216 provides in pertinent part:

> If any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.

OPINIONS BELOW

The opinion of the district court is not reported here, but is set out in Appellant's Jurisdictional Statement, Appendix A.

STATEMENT OF THE CASE

Appellee is a 67 year old white male who retired in November, 1977, from his job with the Post Office. He has never been an insured individual under the Social Security Act and has never received old age, survivor or disability benefits under the Act. His wife, Mary, worked as an employee of a local bank in Cullman, Alabama for thirty-five years. She was a fully insured individual under the Social Security Act at the time of her retirement in June, 1977.

In December of 1977, Mr. Mathews filed an application for husband's insurance benefits based on his wife's earnings

records.[1] Prior to his retirement in November, 1977, the Appellee inquired as as to whether he would be eligible for spousal benefits. He was advised that as a result of this Court's decision in *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) that he would be entitled to receive benefits under Section 202(c) of the Social Security Act, 42 U.S.C. § 402(c), notwithstanding his receipt of a government pension.

Prior to the *Goldfarb* decision, benefits to male spouses of deceased, retired, or disabled workers who were covered under the provisions of the Social Security Act were paid according to a gender-based dependency test. Wives automatically received spousal benefits, subject to the dual entitlement rules.[2] Husbands, on the other hand, in order to receive spousal benefits, had to meet a gender-based dependency test. This dependency test required proof that they received at least one-half of their support from covered wives. If the dependency criteria were met, these benefits were also subject to the dual entitlement rules. Female spouses who were not themselves entitled to Social Security benefits because they worked in government employment, however, were still eligible for spousal benefits. This meant that female spouses who were government employees automatically received spousal benefits on the earnings record of their covered husbands, while husbands who were government employees had to satisfy the one-half support test in order to be eligible for spousal benefits. This resulted in the earnings record of covered female employees providing less protection for their families than similarly situated male employees.

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[1] Mr. Mathews filed his application for spousal benefits thirty days before his 62nd birthday—January 13, 1978. 42 U.S.C. 402 (c) requires that the husband be at least age 62 before being eligible for spousal benefits.

[2] 42 U.S.C. 402(k)(3)(A) reduces the amount of spousal benefits by any amount an individual is entitled to receive based on his or her own earnings record.

The gender-based dependency test was examined in *Goldfarb* and declared invalid by the Court as violative of the equal protection component of the Fifth Amendment.[3] Husbands like Mr. Mathews were now entitled to spousal benefits automatically, without proof of dependency, as were wives before the *Goldfarb* decision, subject only to the dual entitlement rules. Additionally, after *Goldfarb* it became possible for government employed husbands to receive spousal benefits, as well as government-employed wives, without any offset based upon their own government pensions. The practical effect of the *Goldfarb* decision extending benefits without need of demonstrating dependency was to entitle Mr. Mathews to receive dependency was to entitle Mr. Mathews to receive spousal benefits on his wife's earnings record on both the date of his retirement decision and the December 15, 1977 date of his application for benefits.

Mr. Mathews filed his application for spousal benefits at a time in which he did not have to demonstrate dependency. The Social Security Administration advised him on March 23, 1978, that in accordance with the provisions of the Social Security Amendments of 1977[4] his non-dependency would result in his monthly spousal benefit being offset dollar-for-dollar by the amount of his government pension.[5] Mr. Mathews was notified

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[3] The Court invalidated the dependency requirement in Public Law No. 95-216, 91 Stat. 1509.

[4] Section 334(g)(1)(B) of Public Law No. 95-216.

[5] Mr. Mathews on the date of his application for spousal benefits was receiving a civil service pension of $573.00 per month. The Social Security Administration determined that he would be entitled to receive $153.20 in spousal benefits. Since the amount of his government pension exceeded the amount of his entitlement to spousal benefit, the latter was reduced to zero.

that this determination was made in accordance with Section 334 of Public Law 95-216. This section, known as the government pension offset provision, was enacted in December of 1977 as an amendment to the husband's insurance benefits section of the Social Security Amendments of 1977. It was not contained in the 1977 Carter Administration's proposals to remedy the Social Security trust fund's financial problems nor in the proposal passed by the House. The government pension offset provision first appeared in a Senate-enacted proposal which, similar in effect to the dual entitlement rules, reduced the amount of spousal benefits a government worker would be entitled to by the amount of his or her government pension.

Because of the discrepancy between the Senate proposal and the bill passed by the House, the matter was referred to a Conference Committee. An agreement was reached which accepted in principle the Senate's pension effect provision but added for the first time an exception clause postponing the effective date of the government pension offset until after December, 1982. The eligibility for the exception clause was open to all individuals who would have been eligible for full spousal benefits under the Social Security Act "as it was in effect and being administered in January, 1977."[6]

The Social Security Administration interpreted the exception clause as reinstating, for a period of five years, the very same gender-based dependency test which had previously been held unconstitutional in *Goldfarb*.[7] Because Mr. Mathews could not

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[6] Nothing is apparent in the legislative history of the exception clause as to why the January, 1977 date was selected.

[7] *Califano* v. *Goldfarb* struck down the dependency requirement found in 42 U.S.C. 402(f) (1976). Approximately three weeks after the *Goldfarb* decision, the Court summarily affirmed two district court decisions striking down the one-half support requirement applicable to husband's benefits. *Califano* v. *Silbowitz*, 430 U.S. 924 (1977); *Jablon* v. *Califano*, 430 U.S. 924 (1977). Mr. Mathews' application was for husbands' benefits under 42 U.S.C. 402(c).

satisfy the dependency criteria to qualify for the exception clause, he was notified that he could receive no spousal benefits from Social Security. It is undisputed that, had the gender of the Mathews been reversed, Mrs. Mathews' application as a non-dependent spouse would have been granted.

Recognizing the apparent problems of attempting to reinstate the gender-based dependency criteria and facing the December, 1982 expiration of the exception clause, Congress agreed on December 21, 1982 to amend the exception clause eligibility criteria. The new provision enacted in Public Law 97-455[1] states that the government pension offset does not apply to an individual who becomes eligible for a government pension prior to July, 1983, if that individual can satisfy the dependency requirement. Unlike the gender-based dependency test administratively applied by the Social Security Administration in determining eligibility for the exception clause effective for the years 1977-1982, the new provision requires the dependency test to apply to both men and women. No longer is there a gender-based dependency test applicable to only male spouses.

THE QUESTIONS ARE NOT SUBSTANTIAL

1. The first question rests upon the statutory construction of the criteria for qualifying for the exception clause to the government pension offset provision. Appellee's threshold thesis is that Congress intended the exception clause to protect the reliance interests of soon to retire men and women without reference to a gender-based dependency test. Hence, the qualifying criteria for the exception clause should be interpreted as

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[1] H.R. 7092, passed by Congress on December 21, 1982, was signed into law by President Reagan on January 12, 1983. The amendments to the Social Security Act appear in Section 7 of the Virgin Island Tax Bill. The text of the amendments is fully set forth in Appendix A. The Joint Explanatory Statement of the Conference Committee is set forth in Appendix B.

non-gender specific notwithstanding the Social Security Administration's incorporation of a gender-based dependency test. Simply stated, the exception clause should be construed as applicable to both male and female spouses without any reference to a gender-based dependency test—an interpretation that would entitle Mr. Mathews to receive spousal benefits.

If, on the other hand, the Court resolves the threshold question by concluding that Congress intended to incorporate by reference the gender-based dependency test as the standard for qualification under the exception clause, then the dependency requirement should clearly be held to violate equal protection constraints. This should be an obvious conclusion because the gender-based dependency requirement incorporated by reference into the exception clause is the very one struck down in *Califano* v. *Goldfarb,* 430 U.S. 199 (1977). If the Appellee's position on the threshold thesis is correct, then there is no occasion to reach the equal protection issue.[9]

A. The cardinal principle of statutory construction is for the Court to construe the exception clause in a manner to avoid a constitutional issue if such construction is "fairly possible" from the language of the statute. *United States* v. *Batchelder,* 442 U.S. 114, 122 (1979). To resolve Appellee's threshold issue the Court must first examine the language of the exception clause.[10] Nowhere in the statute is there specific mention of the

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[9] The severability issue also would not need to be addressed.

[10] Section 334(g)(1)(B) of the Social Security Amendments of 1977 provides that the government pension offset provision does not apply to any individual who meets the requirements for spousal benefits "as in effect and being administered in January 1977." The Social Security Administration has construed this language to require male spouses to demonstrate that they receive at least one-half of their support from their spouses before being eligible for spousal benefits. Female spouses need not establish dependency in order to be eligible for the exception clause.

gender-based dependency test utilized to deny Mr. Mathews spousal benefits.[11] Not only is the statute facially non-gender specific but the legislative history reveals that Congress intended the exception clause to apply to individuals who were close to retirement. Congress therefore created a non-gender specific class entitled to benefit from the legislation. Support for the non-gender specific approach was evidenced by the particular problems facing women as a component of this class.[12] There is

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[11] Prior to the *Goldfarb* decision male spouses were entitled to benefits only if they could fulfill the dependency requirement. 42 U.S.C. 402(c)(1)(C) (1976) (former provision).

[12] The only legislative history for the exception clause if found in the Senate and House Conference Reports and a Committee Print of the House Ways & Means Committee. The Senate and House Conference Reports are identical in language and provide the following explanation for the exception clause:

> The House recedes with an amendment which would provide for an exception for certain people who are already receiving pensions based on non-covered public employment (or who would be eligible for such pension within 5 years of the month of enactment) and who could have expected to receive social security benefits as dependents or survivors under the social security law as in effect on January 1, 1977. The managers are concerned that there may be large numbers of women, especially widows in their late fifties, who are already drawing pensions, or would be eligible to draw them within 5 years of the date of enactment of this bill, based on their non-covered work and whose retirement income was planned for on the assumption of the availability of full wife's and widow's benefits under social security. Inclusions of this exception to the applicability of the Senate provision, reinforces its prospective nature and avoids penalizing people who are already retired or close to retirement from public employment and who cannot be expected to readjust their retirement plans to take account of the "offset" provision that will apply in the future.

H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 71-72 (1977); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 71-72 (1977). The Summary of the Conference Agreement printed by the House Ways and Means Committee is entirely non-gender specific in referring to the exception clause. It provides:

nothing apparent in the legislative history or the statute itself to justify the construction utilized by the Social Security Administration to resurrect an unconstitutional dependency test.

Several other arguments mandate the same conclusion. A comparison of the exception clause language "as being administered in January, 1977" with the then current Social Security Claims Manual reveals that the Social Security Administration was "administering" the questioned gender-based dependency test by deferring any decision-making until this Court made its decision in *Goldfarb*. Social Security Claims Manual Transmittal No. 3844 (July 1976).[13] Since this Court

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> The measure contains an exception under which the offset provision would not apply to people who were receiving or will be eligible to receive a public pension within 5 years after enactment. This is to protect those persons who were expecting a social security dependency benefit based on the spouse's record but were not receiving it because of their age or the fact that their spouses were not yet receiving benefits.

House Comm. on Ways and Means, 95th Cong., 1st Sess., Summary of the Conference Agreement on H.R. 9346 - The Social Security Amendments of 1977 (Comm. Print 1977).

[13] The Social Security Claims Manual required the reviewing office to send the following letter to a non-dependent male claimant filing an application for spousal benefits:

> The current law requires that claimants for (widower's) (husband's) benefits meet a one-half support requirement. Some Federal district courts have ruled that this requirement is unconstitutional; however, the Secretary of Health, Education and Welfare has appealed these rulings. On February 23, 1976, the U.S. Supreme Court noted probable jurisdiction of the case of *Goldfarb* v. *Secretary, HEW* (#75-699), but we do not expect the Court to hear the case until the fall of 1976. In the meantime, the law remains unchanged and no payment can be made until a final decision has been rendered on the constitutionality of the one-half support requirement. Even though no payment may currently be made, your claim is being recorded and your rights are being protected. You will be notified of your entitlement or nonentitlement to benefits once the issue is finally resolved.

Social Security Claims Manual Transmittal No. 3844 (July 14, 1976).

struck down the gender-based dependency requirement on March 2, 1977, entitlement to spousal benefits without need of demonstrating dependency was clearly the manner in which the statute was being "administered" in January, 1977.[14] Again, it is obvious that the gender-based dependency test was never meant to be incorporated into the exception clause.

Perhaps the most persuasive statutory construction approach is to interpret the exception clause in light of the *Goldfarb* decision eliminating the gender-based dependency clause. There should be no question that Congress was aware of this decision when it enacted the government pension offset provision and the accompanying exception clause. The fact that Congress passed these provisions after the *Goldfarb* decision raises the presumption that Congress was adopting the construction of entitlement to spousal benefits pronounced by this Court—that dependency was no longer required. *Shapiro* v. *United States*, 335 U.S. 1 (1948); *Hecht* v. *Malley*, 265 U.S. 144 (1924). The Seventh Circuit in *Gebbie* v. *United States R. R. Retirement Board*, 631 F.2d 512 (7th Cir. 1980) reached a similar conclusion is determining that reference in the Railroad Retirement Act of 1974 to certain provisions in the Social Security Act "as in effect on December 31, 1974" should be interpreted without reference to the dependency which was struck down in *Goldfarb*.[15] In

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[14] The Social Security Administration neither approved nor denied non-dependent male applications for spousal benefits for the period July, 1976 to March, 1977. Ostensibly, all applications for benefits for this period were granted after this Court's decision in *Goldfarb*. It is interesting to note that retroactive benefits to male spouses whose applications for benefits were denied due to lack of dependency has been upheld even dating back as early as October 5, 1973. See *Wright* v. *Califano*, 603 F.2d 666 (7th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

[15] The Seventh Circuit held that "[i]t is difficult for the [Railroad Retirement] Board to take the position that Congress intended this language to have the extraordinary effect of insulating the Social Security component of Railroad Retirement benefits against the 'change' brought about by *Goldfarb*." 631 F.2d at 516.

discussing the exception clause of the Social Security Amendments of 1977, two district courts have reached the same conclusion. *Wachtell* v. *Schweiker*, No. 80-8022-Civ. ALH (S.D. Fla., Jan. 26, 1982), (the full text of the decision is set forth in Appendix C), and *Webb* v. *Harris*, 509 F. Supp. 1091 (N.D. Cal. 1981).

Any of the above approaches would require that the gender-based dependency test not be incorporated into the eligibility criteria for the exception clause. The result would be to entitle Mr. Mathews to spousal benefits without proof of dependency. As the statutory construction issue leads to this obvious conclusion, the Court is certainly justified in summarily affirming the district court decision on this basis.

B. If, in the alternative, the exception clause does incorporate the gender-based dependency requirement, then the Court should easily conclude that such a requirement violates the equal protection component of the Fifth Amendment. After all, this is the same dependency clause held unconstitutional in *Califano* v. *Goldfarb*, 430 U.S. 199 (1977).[16]

Appellee notes that the Secretary has advanced only one justification for the dependency requirement—the protection of reliance interest. The Secretary intimates that since the gender-based dependency requirement incorporated into the exception

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[16] Appellee queries the situation confronting Leon Goldfarb if Appellant's argument is accepted. Mr. Goldfarb's receipt of spousal benefits after December, 1977 would face the same problem as Mr. Mathews in that both are retired non-dependent federal employees. 430 U.S. 199, 203. The Court's ruling in *Goldfarb* would seem of dubious value in that not more than nine months after the decision the Social Security Administration was applying the same gender-based dependency requirement to deny Mr. Goldfarb spousal benefits. It appears that the same constitutional infirmities present in the gender-based dependency requirement are applicable again and would be utilized to deny Mr. Goldfarb spousal benefits.

clause serves to protect reliance interests, such a provision is immunized from equal protection examination.[17] This approach seeks to lay aside the judicial standards of equal protection applicable to gender-based classifications in favor of a more lenient equal protection standard applicable to social and economic benefits. The fallacy of this approach is that it fails to honestly recognize that a gender-based classification is present and that in order to withstand constitutional challenge, there must be an "exceedingly persuasive justification for the classification." *Mississippi University for Women* v. *Hogan*, ___ U.S. ___, 102 S. Ct. 333 (1982).[18] The explanation tendered by the Secretary in the Jurisdictional Statement is woefully inadequate in satisfying this responsibility.

The Secretary theorizes that in making retirement decisions only women and dependent men could have relied upon their entitlement to spousal benefits. The inadequacy of this theory is that it fails to account for at least two identifiable classes of non-dependent males who relied on their entitlement to spousal benefits. The first class is comprised of non-dependent males vindicating their entitlement to spousal benefits prior to the

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[17] The Government supports its position by reference to *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980). A close examination of Justice Rehnquist's decision in *Fritz*, however, indicates that "suspect" classifications and their accompanying judicial standards of review were not involved in the Court's decision making. *Id.* at 174.

[18] As applied to the exception clause, the burden rests with the Government to demonstrate an "exceedingly persuasive justification" for incorporating the gender-based dependency requirement. *Kirchberg* v. *Feenstra*, 450 U.S. 455, (1981).

Goldfarb decision.[19] The second and perhaps more significant class consists of the 29,026 males claiming entitlement to spousal benefits after the *Goldfarb* decision but prior to the effective date of the Social Security Amendments of 1977.[20] Clearly, the reliance of this class (of which Mr. Mathews was a member) to unreduced spousal benefits is no less existent simply because the Secretary ignores the actuality of the class. Perhaps this explains why the Secretary has referred to the reliance interest in a quantum measurement.[21]

If protection of reliance interest is the keystone of the legislation, then equal protection requires that the reliance interests of non-dependent men also be protected. The Government cannot

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[19] Judicial authority entitling non-dependent men to spousal benefits was apparent in several district court jurisdictions as early as 1975. *Goldfarb* v. *Secretary of Health, Education and Welfare*, 396 F. Supp. 308 (E.D. N.Y. 1975); *Jablon* v. *Secretary of Health, Education and Welfare*, 399 F. Supp. 118 (D. Md. 1975); *Silbowitz* v. *Secretary of Health, Education and Welfare*, 397 F. Supp. 862 (S.D. Fla. 1975). Although these cases were not class actions they still served as signals to non-dependent males that they would be entitled to spousal benefits.

[20] J. Bondar, "Initial Effect of Elimination of the Dependency Requirement on Entitlement to Husbands' and Widowers' Benefits", Research and Statistics Note No. 2, Social Security Administration, Office of Research and Statistics, June 28, 1982, table 1.

[21] Reply Brief for Appellant, at 2, *Wachtell* v. *Schweiker*, Appeal No. 82-5552 (11th Cir.) In its Reply Brief, the Secretary wrote "the Wachtells and other families that became entitled to benefits only after the decision in *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), never expected to receive the extra money until March of 1977, and its loss in December of 1977 would have upset few if any of their plans in a *significant* way." (emphasis added) *Id.* This is an overly simplistic view. In most cases, once a non-dependent male retires he loses the option of returning to gainful employment even though he learns some months later that spousal benefits will be terminated. Most retirement decisions made prior to the effective date of the Social Security Amendments of 1977 are irreversible. In this fashion, the retirement decisions of non-dependent males are equally significant in their impact on the individual.

simply wish away Mr. Mathews' retirement decision being made at a time in which he was eligible for unreduced spousal benefits. As the sole justification for the incorporation of the gender-based dependency requirement vests singularly on the protection of reliance interests, it should summarily fail the equal protection analysis because it does not recognize the reliance interests of the non-dependent male.

2. Assuming that the qualifying criteria applicable to the exception clause violates equal protection, the Court must next resolve the problem of the statute's underinclusiveness. In analyzing this issue, the Court has previously held that the remedy for an equal protection violation is to extend the benefits of the statute to the excluded class.[12] Application of the extension doctrine would allow Mr. Mathews to qualify under the exception clause without demonstrating dependency. The Secretary, in response, contends that the severability clause contained in the government pension offset forecloses extension of benefits to the excluded class and dictates that the entire exception clause be voided.[13] The Secretary's approach to the prob-

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[12] The extension of benefits to the excluded class has been the rule rather than the exception. See *Califano* v. *Westcott*, 443 U.S. 76 (1979); *Califano* v. *Silbowitz*, 430 U.S. 924 (1977); *Jablon* v. *Califano*, 430 U.S. 924 (1977); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973); *Richardson* v. *Griffin*, 409 U.S. 1069 (1972).

[13] Even though arguing that the severability clause should be applied, the Secretary has failed to implement its clear mandate by continuing to recognize the exception clause in determining entitlement to spousal benefits. If the severability provision is valid then the Secretary should have implemented its directives in 1981 when the exception clause was first held invalid. *Rosofsky* v. *Schweiker*, 523 F. Supp. 2292 (E.D. N.Y. 1981). The Secretary's position produces the curious result that no individual receiving a government pension who retired between 1977 and 1982 can claim an exemption from the government pension offset. Dependent government employees who retire from January, 1983 through July, 1983, however, can claim an exemption by virtue of Section 7 of Public Law 97-455. Surely, this interpretation is completely contrary to the intent of the exception clause.

lem of the statute's underinclusiveness is only justified if the severability clause itself does not represent interference with the judicial function.

The resolution of this question should begin with the understanding that the severability clause of the government pension offset is not in the nature of a traditional provision. The traditional severability clause recognized by the Court provides that if a portion of a statute has been stricken as invalid, the remainder is self-sustaining and capable of enforcement without regard to the stricken portion. The Court on many occasions has affirmed the validity of this type of severability clause.[14] But the Court has never honored a severability clause which purports in advance of litigation challenging the constitutionality of the statute to preclude a federal court from awarding [redacted]ble relief to individuals whose constitutional rights are violated. By contrast, the severability clause of the government pension offset is an "inverse" provision. Specifically, it seeks to invalidate the entire statute if any individual provision is held invalid. The effect of the severability clause in question is to suppress judicial review and to allow the legislature to arrogate judicial review of the statute. If accepted by the Court, Mr. Mathews will be without a remedy despite a clear equal protection violation.

The Court has consistently held that any person whose rights under the Constitution are violated is entitled to an adequate remedy for the violation. *Davis* v. *Passman*, 442 U.S. 228 (1979); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931). Contrary to the

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[14] The "traditional" severability was recognized in *Marsh* v. *Buck*, 313 U.S. 406 (1941); *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419 (1938); *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210 (1932).

position of the Secretary, affording Mr. Mathews nothing more than the dubious satisfaction of seeing wives and dependent husbands lose their Social Security benefits (the result mandated by the severability clause) is to provide him with no relief whatever from the equal protection violation. The injury Mr. Mathews suffers by virtue of incorporation of the gender-based dependency requirement is not merely the abstract wrong of unequal treatment; it is the tangible loss of statutory benefits to which he is entitled. *Thomas* v. *Review Bd. Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). The claim of a tangible loss (as opposed to the abstract interest in equality) rises to the level of a controversy which a federal court is empowered by Article III of the Constitution to decide. *Valley Forge College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

The legislature has impermissibly impeded the federal courts from redressing a constitution violation by precluding the award of benefits and failing to afford any alternative remedy to the excluded class. The district court in analyzing this question properly invalidated the severability clause contained in the government pension offset provision.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Appellant has presented no substantial question for the decision of this Court, and that the judgment and decree of the district court should be affirmed.

Respectfully submitted,

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February 17, 1983

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion to affirm has been served on the Solicitor General by mailing an appropriate number of copies of said motion to him, postage prepaid and properly addressed.

This the 17th day of February, 1983.

JOHN R. BENN
Of Counsel for Appellees

APPENDIX

APPENDIX A

VIRGIN ISLAND TAX BILL

PUBLIC LAW 97-455

Sec. 7. Offset Against Spouses' Benefits On Account Of Public Pensions

(a) ADDITIONAL EXEMPTION.—

(1) Section 334 of the Social Security Amendments of 1977 (Public Law 95-216) is amended by adding at the end thereof the following new subsection:

(h) In addition, the amendments made by the preceding provisions of this section shall not apply with respect to any monthly insurance benefit payable, under subsection (b), (c), (e), (f), or (g) (as the case may be) of section 202 of the Social Security Act, to an individual—

(1) to whom there is payable for any month prior to July 1983 (or who is eligible in any such month for) a monthly periodic benefit (within the meaning of such provisions) based upon such individual's earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section 218(b)(2) of the Social Security Act); and

(2) who at the time of application for or initial entitlement to such monthly insurance benefit under such subsection (b), (c), (e), (f), or (g)—

(A) meets the dependency test of one-half support set forth in paragraph (1)(C) of such subsection (c) as it read prior to the enactment of the amendments made by this section, or an equivalent dependency test (if the individual is a woman), in the case of an individual applying for or becoming entitled to benefits under such subsection (b) or (c), or

(B) meets the dependency test of one-half support set forth in paragraph (1)(D) of such subsection (f) as it read prior to the enactment of the amendments made by this section or an equivalent dependency test (if the individual is a woman), in the case of an individual applying for or becoming entitled to benefits under such subsection (c), (f), or (g).

(2) Section 334(f) of such Act is amended by striking out "The amendments" and inserting in lieu thereof "Subject to subsections (g) and (h), the amendments".

(b) REPORT BY SECRETARY.—The Secretary of Health and Human Services shall conduct a study of the provisions of title II of the Social Security Act which require an offset against spouses' and surviving spouses' benefits on account of public pensions, as added by section 334 of the Social Security Amendments of 1977 (taking into account the amendment made by subsection (a) of this section as well as the provisions of such section 334), and shall report to the Congress no later than May 15, 1983, his recommendations for any permanent legislative changes in such provisions (or in the applicability of such provisions) which he may consider appropriate.

(c) TECHNICAL AMENDMENTS.—Subsections (b)(4)(A), (c)(2)(A), (e)(8)(A), (f)(2)(A) and (g)(4)(A) of section 202 of the Social Security Act are each amended by inserting "for purposes of this title" after "as defined in section 210".

(d) EFFECTIVE DATE.—The amendments made by subsections (a) and (c) of this section shall be effective with respect to monthly insurance benefits for months after November 1982.

And the House agree to the same.

APPENDIX B

December 21, 1982 H. 10654

CONGRESSIONAL RECORD—HOUSE

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

Public Pension Offset

Present law.—Prior to 1977 social security spouse's benefits were available only to men who could meet a dependency test and to women, all of whom were presumed to be dependent. These provisions were declared in March 1977 (*Califano* v. *Goldfarb*) unconstitutional since they applied differently to men and women.

The Social Security Amendments of 1977 responded to the *Goldfarb* decision by providing, except for beneficiaries who are covered by the public pension offset exception clause, that social security dependents' benefits which are paid to spouses of retired, disabled, or deceased workers are reduced dollar-for-dollar by an amount equal to any public pension which the spouse receives as a result of his or her own employment by a Federal, state or local government which is not covered by social security. (Non-covered government employment is defined as employment not covered under section 210 of the Social Security Act on the last day the spouse was employed by the government.)

Under the exception clause (which expired December 1, 1982), the offset would not apply if: (1) a beneficiary is either receiving or eligible to receive a government pension based on non-covered employment for any month in the period December 1977 through November 1982, and (2) the beneficiary, at the time of filing for social security dependents' benefits, meets all the requirements for entitlement as they were

in effect and being administered in January 1977. The law in January 1977 required men, but not women, to prove they were dependent on their spouses for at least one-half of their support in order to qualify for the spouse benefit.

House bill.—The House bill provides that during the 60 month period beginning with December 1982, the amount of the public pension used for purposes of the public offset shall be an amount equal to one-third of the public pension.

Senate amendment.—No provision.

Cost effect.—According to unofficial estimates of the Congressional Budget Office, the House bill would increase outlays by the following amounts (by fiscal years, in millions of dollars):

1983 ----------15

1984 ----------40

1985 ----------65

1986 ----------85

1987 ----------108

1988 ----------30

Conference agreement.—The Conferees agreed that, in lieu of a modification of the public pension offset clause, the public pension offset would not apply to an individual who becomes eligible for a public pension prior to July 1983 if that individual is dependent upon his or her spouse for one-half support. The one-half support test would be applied according to the pre-1977 law, except that it would apply to both men and women.

The amendment would also require the Secretary of Health and Human Services to study the pension offset provisions and

to report his recommendation for any permanent legislation that may be appropriate by May 15, 1983.

In addition, the Conferees agreed to specify the definition of non-covered government employment as government employment which on the last day the spouse was employed, was not covered employment for purposes of title II of the Social Security Act.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CIVIL ACTION NO. 80-8022-Civ AHL

Stanley Wachtell,
SS # 069-16-6067, Plaintiff,

v.

Richard S. Schweiker, Secretary of Health
and Human Services, Defendant.

REPORT & RECOMMENDATION

This is a review of a final decision of the Secretary of Health and Human Services of the United States of America, who has determined that the Plaintiff was not entitled to Husband's Insurance Benefits under Section 202(c) of the Social Security Act, 42 U.S.C. Section 402(c), as amended, and that claimant was overpaid benefits in the amount of Eight Hundred Dollars Ten ($800.10) Cents.

The Honorable Alcee L. Hastings, United States District Judge, has referred this cause to the undersigned for review of the administrative record and preparation of a recommended decision as to whether the record contains substantial evidence to support the administrative decision. *Mathews* v. *Weber*, 423 U.S. 261 (1976). Moreover, in light of the fact that the administrative law judge determined that questions of constitutionality pertaining to the Social Security Act or amendments thereto were not properly before his forum, the Court will consider the constitutional question presented by Plaintiff.

For its consideration in this case, the Court has the Complaint and Answer, which were filed together with a certified transcript

of the record, including the evidence upon which the findings and decision complained of are based. In addition, the Secretary has filed a Motion for Summary Judgment with Memorandum in Support of the Motion. The Plaintiff has also filed a Motion for Summary Judgment with Supporting Memorandum and a "Brief in Opposition to Defendant's Motion for Summary Judgment".

It appears that all administrative remedies have been exhausted, and the case is now ripe for decision pursuant to 42 U.S.C. Section 405(g).

Plaintiff seeks to retain Husband's Insurance Benefits in addition to his pension from the federal Government. The facts are undisputed. Plaintiff filed an application for husband's insurance benefits under Title II of the Social Security Act on August 23, 1977. On December 1, 1977, Plaintiff was notified that he was entitled to receive Husband's Insurance Benefits under Section 202(c) of the Social Security Act, 42 U.S.C. Section 402(c), which provides benefits to the husband of an individual entitled to old-age or disability benefits, if such husband:

(a) has filed application for husband's insurance benefits;

(b) has attained age 62, and

(c) is not entitled to old-age or disability benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife.

Plaintiff Wachtell received these benefits monthly beginning in December, 1977. On September 1, 1978, the Plaintiff was notified that because he was receiving a federal pension which exceeded the amount due him as spouse's benefits, he was not entitled to receive husband's insurance benefits. The Defendant ordered all further benefits be discontinued and determined that

Plaintiff had been overpaid spouse's benefits in the amount of Eight Hundred Dollars Ten ($800.10) Cents for the period December, 1977 through August, 1978.

The Secretary's decision was based upon the amendments made to the Social Security Act by Congress on December 20, 1977, which included a "pension offset" provision to the monthly insurance benefits payable under Title II of the Social Security Act. Section 334, Social Security Amendments of 1977, Pub. L. 95-216, 91 State. 1544 *et seq.* The pension offset provision provides that the monthly benefit amount of a spouse's benefit will be reduced by an amount equal to the amount of any monthly benefit payable to the individual from a federal or state pension. Section 334(f) of Public Law 95-916 provides:

> The amendments made by this section shall apply with respect to monthly insurance benefits payable under Title II of the Social Security Act for months beginning with the month in which this Act is enacted, on the basis of applications filed in or after the month in which this Act is enacted.

Thus, the pension offset provisions of Pub. L. 95-216 apply to all benefits payable under Title II effective December 1977. Plaintiff filed his application on August 23, 1977, but the first month for which he met the eligibility requirements for husband's benefits was December, 1977. Therefore, pursuant to Section 202(j) of the Social Security Act, 42 U.S.C. 402(j)(2), the Administration deemed his application to have been filed in December, 1977, and subject to the pension offset provision of the 1977 Amendments.

On September 6, 1978, Plaintiff requested reconsideration of the initial determination which found him subject to the Government pension offset (Tr. 115). In a reconsideration determination issued September 28, 1978, the initial determination was affirmed (Tr. 116-118). The Plaintiff requested a hearing before an administrative law judge (Tr. 127-129), which was

held on June 26, 1979 (Tr. 23-94). On September 28, 1979, the administrative law judge issued a decision affirming application of the Government pension offset to Plaintiff's entitlement and finding him in receipt of an overpayment in benefits of Eight Hundred Dollars and Ten ($800.10) Cents (Tr. 4-17). Plaintiff requested Appeals Council review of the administrative law judge's decision (Tr. 3). On November 23, 1979, the Appeals Council denied the request for review, making the administrative law judge's decision the final decision of the Secretary subject to judicial review (Tr. 2).

The applicable provision of the Social Security Act is Section 202(c), 42 U.S.C. Section 402(c), which provides in pertinent part:

> (c)(1) The husband . . . of an individual entitled to old-age or disability insurance benefits, if such husband—
>
> (A) has filed application for husband's insurance benefits,
>
> (B) has attained age 62, and
>
> (C) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,
>
> shall be entitled to a husband's insurance benefit for each month . . .
>
> (2)(A) The amount of a husband's insurance benefit for each month . . . shall be reduced (but not below zero) by an amount equal to the amount of any monthly periodic benefit payable to such husband for such month which is based upon his earnings while in the service of the Federal Government or any State (or political subdivi-

> sion thereof, . . .) if, on the last day he was employed by such entity, such service did not constitute "employment" as defined in section 410 of this title.

Section 402(c)(2)(A) is the pension offset provision added by the Social Security Amendments of 1977 and the basis of the Secretary's decision that the Plaintiff is not entitled to spouse's benefits.

However, the Social Security Amendments of 1977 contain an important exception to the operation of the various pension offset provisions. Section 334(g) of Pub. L. 95-216 provides the pension offset provisions

> "shall not apply with respect to any monthly insurance benefit payable . . . to an individual (A) to whom there is payable for any month within the 60-month period beginning with the month in which this Act is enacted [December, 1977] . . . a monthly periodic benefit . . . based upon such individual's earnings while in the service of the Federal Government . . . and (B) who at time of application for or initial entitlement to such monthly insurance benefit . . . meet the requirements of that subsection as it was in effect and being administered in January 1977."

The interpretation of this exception clause is the basis of the Plaintiff's complaint that he has been unconstitutionally denied husband's insurance benefits. Although there is an indication in the administrative record that Plaintiff previously challenged the offset provision itself as an unconstitutional deprivation of his fifth amendment rights, the Plaintiff has not presented the issue in this cause. The Plaintiff challenges the Secretary's decision that he is not entitled to the protection of the exception clause, Section 334(g), Pub. L. 95-216.

The Secretary has determined that although the Plaintiff meets the other requirements of the exception clause [Section

334(g)], he does not meet the requirements of Section 202 of the Act "as it was in effect and being administered in January 1977". The Secretary has interpreted that phrase to mean that in addition to the other requirements for husband's insurance benefits which Plaintiff has met, he would have to prove he was receiving at least one-half of his support from his spouse.

The Plaintiff maintains that the Secretary's interpretation of the exception clause to the offset provision is unconstitutional in that it discriminates against him solely on the basis of sex and violates the equal protection component of the fifth amendment to the United States Constitution.

In January of 1977, Section 202(c) of the Social Security Act provided husband's insurance benefits if such husband—

(A) has filed application for husband's insurance benefits,

(B) has attained age 62,

(C) was reciving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual—

(i) if she had a period of disability which did not end prior to the month in which she became entitled to old-age or disability insurance benefits, at the beginning of such period or at the time she became entitled to sucn benefits, or

(ii) if she did not have such a period of disability, at the time she became entitled to such benefits,

and filed proof of such support within two years after the month in which she filed application with respect to such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits, and

(D) is not entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife.

The requirement of Section 202(c), 42 U.S.C. 402(c), which provided that a husband seeking insurance benefits through his wife's benefits must show that he received at least one-half support from her was not imposed upon a woman seeking insurance benefits through her husband's account; she was presumed dependent. In 1977, the Supreme Court held a dependency requirement for men but a presumption of dependency for women was an unconstitutional violation of due process and equal protection. *Califano* v. *Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed. 2d 270 (1977). At the same time, the Supreme Court affirmed the 1975 decisions of this Court and of the District Court for Maryland that the dependency requirement of 42 U.S.C. 402(c) was violative of the equal protection guarantee of the Fifth Amendment. *Silbowitz* v. *Secretary of Health, Education and Welfare*, 397 F.Supp. 862 (S.D. Fla. 1975), *aff'd mem.*, 430 U.S. 924, 97 S.Ct. 1539, 51 L.Ed.2d 768 (1977); *Jablon* v. *Secretary of Health, Education and Welfare*, 399 F.Supp. 118 (D. Md. 1975), *aff'd mem.*, 430 U.S. 924, 97 S.Ct. 2535, 51 L.Ed.2d 768 (1977). In both cases, the courts' decisions required that the Social Security Act be interpreted and enforced without reference to the dependency requirement.

The Secretary now urges that the Plaintiff does not qualify for husband's insurance benefits under the exception to the offset provisions because he cannot prove dependency on his wife. The Secretary's interpretation of the phrase "as it was in effect and being administered in January 1977" cannot be accepted. The Secretary's interpretation would compel the Court to accept the premise that the law is only that which is printed in the statutes and would have the Court ignore the decisions in *Califano, Jablon* and *Silbowitz*.

In short, the Secretary's interpretation of the exception clause would extend for five years a provision which the Courts have declared unconstitutional. Clearly, no Act of Congress can authorize a violation of the Constitution. *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973). Nor may Congress by its legislation override the Constitution. *Brubaker* v. *Board of Education*, 502 F. 2d 973, 989 (7th Cir. 1974).

It has been established since 1803 that a federal court has the power to refuse to give effect to congressional legislation if it is inconsistent with the court's interpretation of the Constitution. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). However, it is also a familiar principle of constitutional adjudication that the court's duty is to construe a statute, if possible, in a manner consistent with the court's interpretation of the Constitution; in this case, in a manner consistent with the fifth amendment.

> When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. *Benson*, 285 U.S. 22, 62 as cited in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J. concurring).

The Secretary's interpretation that Congress intended to re-establish the requirement that men prove dependency but to keep the presumption of female dependence would mean that Congress intended to re-establish a discriminatory provision of the Social Security Act which has been declared unconstitutional. Such an interpretation cannot be substantiated. As the legislative history of the exception clause indicates, Congress intended to protect the reliance interest of people who had already retired or were close to retirement:

> Inclusion of this exception to the applicability of the Senate provision reinforces its prospective nature and avoids penalizing people who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the "offset" provision that will apply in the future.

Social Security Amendments of 1977, Conference Report No. 95-837, 95th Cong., 1st Sess., p. 72.

The Secretary cites this very language in his brief in support of motion for summary judgment. To be sure, the Conference Report does indicate that the "managers" were concerned that there would be large numbers of women who were receiving Government pensions of would be receiving Government pensions who had planned on full wife's or widow's benefits. However, as the language cited above indicates, the major purpose of the exception clause appeared to be to protect the reliance factor of *people* who were already receiving Government pensions or would be receiving pensions within five years. The Secretary's interpretation of the exception clause would mean that the reliance interest of a female claimant on November 1, 1982, approximately five years after enactment of the offset provision, would be greater than Mr. Wachtell's reliance interest as it existed on December 1, 1977, approximately two and one-half years after this Court's decision that the dependency requirement of 402(c)(1) was unconstitutional, and approximately nine months after that decision was affirmed by the Supreme Court.

The Court agrees with the Government's position that "Congress enacted the exception based upon the reasonable, valid assumption that individuals who were already retired or who would retire shortly after the pension offset was enacted would not have time to alter their retirement plans to accommodate the absence of a full spouse's benefit". However, the Court cannot agree with the Secretary's interpretation that Plaintiff Wachtell was not included among those individuals. The exception

clause's requirement that individuals who meet "the requirements of that subsection as it was in effect and being administered in January 1977" must be interpreted to mean the requirements of the subsection in light of the decision in *Silbowitz, Jablon,* and *Goldfarb*. The Court notes that *Congress* specifically considered the Supreme Court's decision in *Goldfarb* when it enacted the 1977 Social Security Amendments. Consistent with the Court's interpretation of the fifth amendment, the dependency clause has been removed from Section 202(c), 42 U.S.C. Section 402(c)(1). Therefore, male and female applicants for spousal benefits are treated equally. Congress then enacted an offset provision for claimants who are receiving a pension based upon earnings while in the service of the Federal Government or any State (or political subdivision thereof). The offset provision applies equally to both male and female applicants. Congress also indicated concern that the offset provision would penalize those people who had already retired and were receiving a Government pension or who would soon receive a Government pension. Therefore, the exception clause was enacted to reinforce the prospective nature of the offset provision and to avoid penalizing people who had already retired or were close to retirement. Conference Report, *supra,* at 72. There is no indication that Congress intended that the Supreme Court's decisions be ignored and the exception clause be interpreted to require a presumption of dependency for female applicants and a dependency test for male applicants in violation of the fifth amendment. Inded, the indications are contrary. As stated, Congress had just abolished the gender-based dependency requirement. It would be irrational to assume that Congress intended to include the gender-discriminatory standard as a requirement in the exception clause.

The exception clause is a valid attempt by Congress to assure the pension offset clause be prospective in nature. However, the Secretary's interpretation of that clause which denies benefits to Plaintiff Wachtell is not consistent with the intent of the legislation.

The Court notes that the issue presented herein has also been considered by the United States District Court for the Northern District of California. It, too, found that "only those constitutional portions of the Social Security Act as it stood in January 1977 are to serve as the measure of whether an individual has fulfilled the requirements necessary to qualify for the exception" to the offset provision. *Webb* v. *Harris*, 509 F.Supp. 1091, 1095 (N.D. Calif. 1981).[1]

Considering the constitutional portions of the Social Security Act as it stood in January, 1977, the Plaintiff has fulfilled the requirements necessary to qualify for the exception to the offset provision and is entitled to receive his husband's insurance benefits.

It is, therefore, the recommendation of the undersigned that Plaintiff's motion for summary judgment be GRANTED and the Secretary be ordered to reinstate Plaintiff's husband insurance benefits.

Pursuant to Title 28 U.S.C. Section 636(b)(1), the parties may serve and file written objections to this report with the Honorable Alcee L. Hastings, United States District Judge, within ten (10) days after being served with a copy of this report.

DATED at Miami, Florida, this 16 day of June, 1981.

/s/ Herbert S. Shapiro
UNITED STATES MAGISTRATE

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[1] As discussed in *Webb*, in addition to the factors already discussed, "the nature of the Social Security legislation itself also must be considered in interpreting Section 334(g)". *Webb* v. *Harris*, 509 F.Supp. at 1094. The Court is required to consider the remedial purpose of the Social Security Act; this Circuit has long stated that the Act should be liberally construed in favor of coverage if such construction is reasonable. *Broussard* v. *Weinberger*, 499 F.2d 969 (5th Cir. 1974); *Sanchez* v. *Schweiker*, 643 F.2d 1128 (5th Cir. 1981).